No. 86-1209 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAM POLUR,

Petitioner,

– against –

THE STATE OF NEW YORK, HON. ALVIN F. KLEIN,
Justice, Supreme Court State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, NEW YORK STATE SUPREME COURT

MEMORANDUM OPPOSING CERTIORARI

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Neither the Hon. Alvin F.

Klein, Justice of the Supreme Court of New York, New York County, nor the Attorney General of the State of New York has ever been a party to the coram nobis proceeding sought to be reviewed here or the underlying civil proceedings in which the criminal contempt prosecution occurred. Indeed, none of the documents included in petitioner's appendix list Justice Klein or the State of New York in the caption. The Attorney General of the State of New York has been informed that Feltman, Karesh, Major & Farbman (formerly Feltman, Karesh & Major), the party which prosecuted the criminal contempt proceeding and the only party with full knowledge of the relevant facts and complete files, has

not been served with a copy of the petition.

Petitioner never petitioned for a writ of certiorari after his direct appeal, his state and federal petitions for a writ of habeas corpus, or his other collateral attack on the contempt conviction. He applied for relief in the nature of a writ of error coram nobis on May 14, 1986, pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1983). That statute provides that the court must deny a motion to vacate a judgment when "[t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment," § 440.10(2)(a), or the movant unjustifiably failed to raise such ground or issue on an appeal when

there were sufficient facts appearing on the record of the proceedings underlying the judgment to have permitted adequate review. § 440.10(2)(c). The court "carefully reviewed all of the papers submitted" by petitioner and found that he had "failed to establish any grounds for the relief requested." Raffe v. Riccobono, No. 9522/85 (Sup. Ct. New York Co. June 23, 1986) (lodged with the Clerk).

Virtually every issue raised on petitioner's coram nobis motion was determined on the merits by the New York courts on his direct appeal.[1]

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[1]For example, he raised on direct appeal his state claims of lack of
(Footnote Continued)

The remaining state and federal issues could, on the basis of the record of the proceedings underlying the judgment, have been raised on his direct appeal.[2]

(Footnote Continued)
personal and subject matter jurisdiction, Appellants' Brief and Appendix in the Appellate Division, First Department ("1st Dep't br."), at 13, 16, and that the contempt order was procurred by fraud and misrepresentation, 1st Dept' br. 9. He also raised his federal claims that prosecution of criminal contempt by private parties was unconstitutional, Jurisdictional Statement, New York Court of Appeals ("Jur. State."), at 10; that he was entitled to a trial, 1st Dep't br. 2, 12, 16; that the conviction violated the prohibition against double jeopardy, 1st Dep't br. 13, and that the proceedings denied him equal protection of the law. Jur. State. 8. These documents have been lodged with the Clerk.

[2]For example, nothing could have prevented him from raising his federal claim that the conviction was based on
(Footnote Continued)

Thus, the denial of coram nobis relief rested on an independent and adequate state procedural ground. This Court will not consider a federal question when it has not been raised, presented, and pursued in a timely and proper manner at the appropriate points in the state court proceedings. Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). Thus, jurisdiction of this Court does not attach when a federal question is initially raised in a petition or assignment of errors filed in the state's highest court,

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(Footnote Continued)
proof beyond a reasonable doubt, or his state law claim that the court had no jurisdiction because there was no lawful mandate. Nothing in the record indicates that he could not have raised any other matter on direct appeal.

which refuses to consider any issue not raised in the trial court. Bailey v. Anderson, 326 U.S. 203, 206-07 (1945); Herndon v. Georgia, 295 U.S. 441, 443 (1935) (attempt to raise federal question for first time on rehearing). See also Engle v. Isaac, 456 U.S. 107, 110 (1982); (failure to follow state procedural requirements for raising federal questions precludes federal habeas corpus review); Wainright v. Sykes, 433 U.S. 72, 79-80 (1977) (same).

Moreover, the petition fails to conform to the rules of this Court in numerous respects. For example, the 12-page list of questions presented fails to comply with the requirement that they "should be short and concise and should not be

argumentative or repetitious." Sup. Ct. R. 21.1(a). It fails to contain a list of all the parties to the proceeding in the court whose judgment is sought to be reviewed, as required by Rule 21.1(b). As demonstrated above, the caption lists only persons who were not parties. The petition also fails to

> specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court

> jurisdiction to review the judgment on writ of certiorari.

Sup. Ct. R. 21.1(h). The appendix fails to comply with Rule 21.1(k)(ii) because it fails to include copies of all the relevant opinions and orders rendered by courts in this case.[3] "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." Sup. Ct. R. 21.5. See also Sup. Ct. R. 21.2.

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[3]For example, it omits the June 23, 1986 order denying coram nobis relief.

CONCLUSION

For all the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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